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Supreme Court, U.S.
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No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TEXAS ASSOCIATION OF BUSINESS AND CHAMBERS OF COMMERCE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether a discrimination plaintiff is entitled to a jury trial or can sustain an age discrimination finding under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (West 1999), when he fails to present sufficient evidence both that the employer's stated reasons for its adverse employment action were false and that age discrimination was the real reason.

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INTEREST OF AMICUS CURIAE[1]

The Texas Association of Business and Chambers of Commerce ("TABCC") is a non-profit corporation that represents employers throughout the State of Texas. It is the largest employer representative in Texas, with a membership that includes more than 6,000 business and 10,000 individual members, and 300 chambers of commerce. TABCC is interested in the outcome in this case because the Petitioner, Roger Reeves ("Reeves"), is asking the Court to adopt a position that would have a grave and unfair effect on employers, like Respondent, Sanderson Plumbing Products, Inc. ("Sanderson"). The pretext for discrimination issue presented here is of paramount importance to employers. In employment discrimination cases, employers in the Fifth Circuit, like TABCC's members, have been subject to the fair, logical, and reasonable requirement that discrimination plaintiffs present sufficient evidence of discrimination before a jury may decide whether the employer is guilty of intentional discrimination. This requirement serves as a sensible filter to block baseless cases and to prevent unfair jury speculation where no evidence of discrimination exists. TABCC and its members have a compelling interest to preserve the Fifth Circuit's fair, logical, and reasonable approach to a discrimination plaintiff's evidentiary burden in employment discrimination cases.

SUMMARY

The Fifth Circuit properly applied the pretext for discrimination analysis articulated and refined in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), concluding that Reeves failed to produce sufficient evidence *both* that Sanderson's performance-related reasons for Reeves' discharge

1. Based on Supreme Court Rule 37.6, *amicus* states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity, other than the law firm representing *amicus*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief *amicus curiae* has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.3(a).

were false *and* that age discrimination was the real reason. This Court should affirm the Fifth Circuit's decision — the pretext for discrimination analysis is consistent with the ADEA's statutory language, the well-established business judgment rule, and the plaintiff's ultimate burden to prove intentional discrimination in an ADEA case.

In stark contrast, Reeves and his Amici rely on an unprincipled, pretext-only test that hinges on an ideological assumption not warranted by the ADEA or Congress — the unsupported assumption that an employer always makes rational business judgments and, therefore, if it does not, the employer's real reason must have been discriminatory. This illogical leap eviscerates the Court's requirement that a discrimination plaintiff present *some* evidence of discrimination to support a discrimination finding, and improperly converts the ADEA into a "just cause" dismissal statute. Further, unbridled by the rational requirement that an employee present some evidence to support a discrimination finding, courts and juries would be allowed to speculate unfairly about employer business decisions, effectively sitting as "super-personnel departments" that would review and second-guess employer business judgments. Certainly Congress did not intend this result in enacting the ADEA.

Moreover, in this ADEA-wrongful discharge case, Reeves and his Amici contend that the minimal prima facie case (a younger individual replaced Reeves), together with his evidence rebutting the employer's explanation for his discharge, constitute sufficient evidence of age discrimination. This argument (i) ignores the Court's unmistakable pronouncement in *Hicks,* namely, that a plaintiff must produce sufficient evidence both that the employer's stated reasons were false and that discrimination was the real reason; (ii) overstates the minimal role of the prima facie case; and (iii) overlooks the plaintiff's ultimate burden to produce sufficient evidence of age discrimination.

Applying the *Hicks* pretext for discrimination analysis, the Fifth Circuit properly concluded that Reeves failed to offer

sufficient evidence that his age was a determining factor in Sanderson's decision to terminate his employment. Reeves challenges and disagrees with the performance-based reasons for his discharge, but those challenges, coupled with his self-assessment of his work performance, do not constitute sufficient evidence to sustain the jury's age discrimination finding. Likewise, Reeves places false hope in two alleged stray remarks a non-decisionmaker supposedly made; these, too, are insufficient to sustain an age discrimination finding.

ARGUMENT

This case presents the pivotal question whether a discrimination plaintiff can avoid judgment as a matter of law or summary judgment in an ADEA case by relying on (i) a skeletal prima facie case criterion (a younger individual replaced Reeves) and (ii) some evidence revealing that Reeves challenged Sanderson's performance-based reasons for discharging him. The Fifth Circuit correctly answered "no," and this court should affirm that judgment.

I. *HICKS* AND *HAZEN PAPER* COMPEL THE CONCLUSION THAT THE FIFTH CIRCUIT PROPERLY APPLIED A PRETEXT FOR DISCRIMINATION ANALYSIS TO REEVES' BASELESS CLAIM.

Reeves and his Amici contend that the Fifth Circuit erred because, under *Hicks*, he need only establish a prima facie case, together with evidence discrediting the employer's reasons for his discharge, to sustain the jury's age discrimination finding. (Pet. Br. 18-32; EEOC Br. 8-30).[2] Ignoring his ultimate burden of proof in a discrimination case, Reeves misinterprets *Hicks* and overstates the force of the prima facie case.

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2. This Brief uses the following abbreviations: Petitioner's brief — "Pet. Br."; Respondent's brief — "Res. Br."; EEOC's *amicus* brief — "EEOC Br."; and AARP's *amicus* brief — "AARP Br."

A. The Proof Burdens in Employment Discrimination Cases.

In *Hicks*, this Court refined and clarified the shifting burdens of proof in a discrimination case:

- A discrimination plaintiff, like Reeves, has the burden to prove a prima facie case of discrimination. When, as here, the ADEA case involves a discharge claim, the prima facie burden is a minimal one. Reeves must establish that he was (i) within the protected age group (over 40), (ii) qualified for his position, (iii) discharged from employment, and (iv) replaced by someone younger or otherwise discharged because of his age.[3]
- If Reeves succeeds in proving a prima facie case, then Sanderson must *articulate* some legitimate, nondiscriminatory reason for discharging Reeves.
- Once Sanderson articulates a nondiscriminatory reason for the discharge, then the presumption raised by the prima facie case disappears and Reeves must prove *both* that the nondiscriminatory reason *was false, and that discrimination was the real reason.*

Hicks, 509 U.S. at 506-11 & n.3 (emphasis supplied); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

Under this scheme, Sanderson's burden to rebut the prima facie case is slight. Sanderson need only produce some evidence that it discharged Reeves for a nondiscriminatory reason. *See, e.g., Hicks*, 509 U.S. at 506-07; *Burdine*, 450 U.S. at 254. Sanderson "need not persuade the court that it was actually motivated by [its] proffered reasons," *Burdine*, 450 U.S. at 254-55, nor must it prove the "absence of a discriminatory motive." *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978). After Sanderson articulates its nondiscriminatory reasons for discharging Reeves, any prima facie presumption "simply drops out of the picture," and Reeves' ultimate burden to produce sufficient evidence of discriminatory treatment remains with him at all times and never shifts to Sanderson. *Hicks*, 509 U.S. at 511. The parties and Amici do not disagree on these fundamental propositions; they part ways on the meaning and interpretation of *Hicks* as applied to a motion for judgment as a matter of law under Federal Rule 50.[4]

3. This Court and the lower federal courts have concluded repeatedly that a discrimination plaintiff's prima facie burden is "de minimis," "minimal," or "not onerous." *See, e.g., Hicks*, 509 U.S. at 506 (describing requirements of *McDonnell Douglas* prima facie case as "minimal"); *Burdine*, 450 U.S. at 253 (describing burden of establishing prima facie case as "not onerous"); *Fisher v. Vassar College*, 114 F.3d 1332, 1340-41 n.7 (2d Cir. 1997) (en banc) (recognizing that over one hundred federal appellate court opinions have characterized the prima facie case as "minimal," "de minimis," or "not onerous."); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996), *cert. denied*, 522 U.S. 1075 (1998) (noting that " '[t]o establish a prima facie case, a plaintiff need only make a very minimal showing.' ").

Additionally, this Court has assumed, without deciding, that the *McDonnell Douglas* burden-shifting scheme is equally applicable to ADEA cases. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993). The lower federal courts and the parties before this Court agree that the burden-shifting scheme applied in Title VII of the 1964 Civil Rights Act cases also applies in ADEA cases. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 44 (1999) (recognizing that the *McDonnell Douglas* burden-shifting regime applies to ADEA cases); *DeLoach v. Infinity Broad.*, 164 F.3d 398, 400-01 (7th Cir. 1999) (same); *Simpson v. Kay Jewelers*, 142 F.3d 639, 643 (3d Cir. 1998) (same).

4. Consistent with *Hicks*, Amicus TABCC requests that this Court adopt the Fifth Circuit's "pretext for discrimination" analysis in both the summary judgment and judgment as a matter of law contexts. Under this analysis, courts require a discrimination plaintiff to produce sufficient evidence both that the employer's proffered reason was false and that discrimination was the real reason before the plaintiff will survive judgment as a matter of law. *See, e.g., Lawrence v. University*

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of Tex. Med. Branch at Galveston, 163 F.3d 309, 312 (5th Cir. 1999) (concluding that "[t]o avoid summary judgment, 'the evidence taken as a whole must create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that [discrimination] . . . was a determinative factor in the [employer's] actions' "); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 22 n.5 (1st Cir. 1999) (recognizing that "[i]n *Hicks*, the Court made it clear that a Title VII plaintiff must present sufficient evidence not only that the employer's proffered reason is false but also that the real reason is discrimination."); *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 199 (4th Cir. 1998) (holding that "[e]ven where an employer's explanation for taking action is disputed or disproved, a discrimination plaintiff must come forward with sufficient evidence that she was the victim of illegal discrimination before her case can go to the jury.").

In contrast, other circuits only require the plaintiff to produce evidence that the employer's reason is false. As explained in this brief, Reeves and his Amici advocate this seriously flawed, pretext-only test. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (noting that a plaintiff may survive judgment as a matter of law by producing evidence that raises a fact issue as to whether the employer's reasons are false); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-47 (6th Cir. 1997) (holding that "once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination."); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1046 (7th Cir. 1999) (observing that " 'once the employee has cast doubt on the employer's proffered reasons for the termination, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury — not the court.' "); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1994) (recognizing that "[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate"); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) (determining that a plaintiff with a prima facie case and evidence of pretext can withstand a summary judgment motion); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) (ascertaining that "a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons").

(Cont'd)

B. The *Hicks* Pretext for Discrimination Analysis Requires a Plaintiff to Produce Sufficient Circumstantial Evidence of Both Falsity and Discrimination.

The holding in *Hicks* is abundantly clear — discrimination plaintiffs are not entitled to judgment as a matter of law if they prove that an employer's articulated reason for an employment practice is untrue. *Id.* at 507. Moreover, the *Hicks* court defined a plaintiff's "pretext for discrimination" burden in unmistakable terms: once the employer has *articulated* a nondiscriminatory reason for its adverse employment action, the plaintiff must prove *both* that the nondiscriminatory reason was false, *and* that discrimination was the real reason. *Hicks*, 509 U.S. at 511 n.4, 515; *see also id.* at 519 ("it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original). Thus, applying the *Hicks* "pretext for discrimination" definition in the summary judgment or judgment as a matter of

(Cont'd)
The remaining circuits apply a hybrid test, concluding that the prima facie case, combined with the falsity of the employer's stated reasons, *may or may not* defeat summary judgment. *See, e.g., Fisher*, 114 F.3d at 1333 (opining that "evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's proffered reason may — or may not — be sufficient to show illegal discrimination"); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir. 1997), *cert. denied*, 521 U.S. 1119 (1997) (reasoning "that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination."); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (reasoning that evidence of pretext is not always enough, but rather, "the court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination and accordingly summary judgment is inappropriate."). As a practical matter, this "hybrid" approach is not significantly different from the Fifth Circuit's "pretext for discrimination" analysis.

law context, Reeves must produce sufficient evidence to raise a triable issue that (i) Sanderson's articulated reasons for Reeves' discharge are false; *and* (ii) age discrimination was the real reason or a determining factor in Sanderson's decision. *Id.* at 511 n.4, 515.

Ignoring these principles, Reeves and his Amici assert that, together with his minimal prima facie case (younger individuals replaced him), he need only cast doubt on the credibility of Sanderson's stated reasons for his discharge to sustain the jury's age discrimination finding. (Pet. Br. 18-32; EEOC Br. 8-30). Otherwise, Reeves complains, the Fifth Circuit improperly requires discrimination plaintiffs to present "direct evidence" of discriminatory treatment, a requirement that conflicts with this Court's decision in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3. (1983) (stating that a plaintiff is not limited to using "direct" evidence to prove a discrimination case). (Pet. Br. 21, 25-26, 32).

This "direct evidence" rhetoric, however, stems from a misreading of *Hicks*. Reeves' "pretext-only" argument focuses on an isolated passage that is dictum to the actual decision in *Hicks*, and the inference Reeves and his Amici manufacture and draw from the passage distorts this Court's actual holding. (Pet. Br. 24; AARP Br. 5-6). That passage reads:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

Hicks, 509 U.S. at 511 (emphasis in original).

This lone passage offers no hope for Reeves' age discrimination claim. First, the passage is dictum because it

does not bear directly on the precise issue then before the Court: whether a plaintiff automatically wins by proving the falsity of an employer's asserted reasons for its actions. Second, Reeves and his Amici's pretext-only interpretation of the passage is taken out of context. The passage does not support Reeves' strained conclusion that a genuine issue for trial exists under the ADEA whenever the plaintiff establishes a prima facie case and counters the employer's stated reason for discharge. When read together with the remainder of the opinion, the quoted passage merely states that, in limited cases in which the employer's stated reasons are obviously contrived, not simply incorrect or unwise, a plaintiff's evidence of pretext *may* combine with his prima facie case to *permit* the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a *finding of discrimination*. *See Hicks*, 509 U.S. at 511 n.4.[5]

By focusing almost exclusively on this one passage from *Hicks*, Reeves and his Amici overlook a significant, coordinate passage from the decision — a passage which effectively blunts the argument that discrediting the employer's stated reasons automatically sustains a discrimination finding:

> [T]here is nothing whatever inconsistent between this statement [that rejection of a defendant's reasons permits the inference of discrimination] and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to

5. Contrary to Reeves' misguided pretext-only analysis, the "mendacity" parenthetical in the *Hicks* passage supports the conclusion that the prima facie case, coupled with some evidence of pretext, does not automatically sustain a discrimination finding. The "particularity" and "mendacity" language in the parenthetical is rendered meaningless and superfluous if *any* evidence of "falsity" is sufficient to support a discrimination finding.

sustain a finding of discrimination, *there must be a finding of discrimination.*

509 U.S. at 511 n.4 (emphasis in original).

Further, the *Hicks* majority repudiated the validity of dicta in *Burdine,* which implied that a plaintiff could prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 509 U.S. at 514 (citing *Burdine*, 450 U.S. at 256). Referencing numerous inconsistencies between the "unworthy of evidence" statement and other Supreme Court pronouncements in *Burdine* and elsewhere, this Court concluded "that the dictum at issue here must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 518. This Court explained that the law does not permit a court to substitute for the required discrimination finding the much different and lesser finding that the employer's explanation for its action was false. *Id.* at 513. Thus, Reeves could have bolstered any proffered evidence of age discrimination by demonstrating that Sanderson's reasons were "unworthy of credence" but, at the end of the day, he was required to produce some circumstantial proof of discrimination. *See id.* at 511 n.4. As the Fifth Circuit properly determined, Reeves came up short.

Similarly, in *Hazen Paper Co.*, 507 U.S. at 610, this Court reasoned that "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait *actually played* a role in that process and had a *determinative influence* on the outcome." (emphasis added). This Court also recognized that inferring age discrimination from the "implausibility of the employer's explanation may be problematic" because the employer may have acted for other unsavory reasons. *Id.* at 613. Remanding the case, the Court instructed the First Circuit to determine whether Biggins had produced sufficient indirect evidence of age bias, such as the employer's alleged more favorable

treatment of his replacement and management's alleged discriminatory comments. *Id.*

Together with *Hicks, Hazen Paper* reveals that a discrimination plaintiff must produce some indirect evidence of discrimination separate and apart from (i) the skeletal "replacement" allegation to support a prima facie case; and (ii) evidence tending to refute the plausibility of the employer's explanation for its adverse employment action. Therefore, a complete reading of *Hicks* and *Hazen Paper* buttresses the Fifth Circuit's conclusion that Reeves must present sufficient evidence which, taken as a whole, raises triable issues of both pretext and intentional discrimination. *See, e.g., Walton v. Bisco Indus., Inc.,* 119 F.3d 368, 370 & n.2 (5th Cir. 1997) (holding that to survive summary judgment, plaintiff must raise fact issue on falsity and that discrimination was the real reason); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.,* 181 F.3d 15, 22 n.5 (1st Cir. 1999) (same); *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 199 (4th Cir. 1998) (same).

Contrary to Reeves and his Amici's arguments, his minimal prima facie case evidence — a younger individual replaced him — does not constitute sufficient evidence to support a discrimination finding. In the age discrimination-wrongful discharge context, the prima facie case is *very minimal* and serves the limited purpose of forcing the employer to proffer its explanation; once the employer explains, all presumptions drop and the case proceeds like any other. Under the circumstances presented here, the "combined" evidence (replacement plus pretext) is insufficient and cannot sustain the jury's age discrimination finding. *Hicks*, 509 U.S. 514-15 (concluding that court cannot substitute pretext-only finding for required discrimination finding); *Fisher v. Vassar College*, 114 F.3d 1332, 1340-42 (2d Cir. 1997) (en banc) (reasoning that presumption bolstering prima facie case is transitory and loses its capacity to support inference of discrimination after employer articulates explanation); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994), *cert. denied*, 513 U.S.

1058 (1994) (holding that replacement alone is not enough to support a discrimination finding); *see also EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1186-87 (5th Cir. 1996) (holding that "[e]vidence that does not imply pretext taken alone does not do so when cumulated."). As the Second Circuit appropriately recognized in *Fisher*, evidence sufficient to satisfy the scaled-down prima facie case does not tell much about whether discrimination played a role in the employment decision. *Fisher*, 114 F.3d at 1337. Thus, Reeves' evidence that a younger person replaced him does not raise any inference that Sanderson fabricated the performance-based reasons for his discharge as a cover for age discrimination.

In summary, allowing a plaintiff to proceed to trial without raising a genuine issue of material fact regarding the ultimate question of discrimination would, in effect, treat discrimination cases differently from other cases involving ultimate questions of fact. This rationale would permit disproof of an employer's reason, when linked with a minimal prima facie allegation about a younger replacement, to suffice as an independent means of proving discriminatory intent in an ADEA case — precisely what the *Hicks* Court rejected. Contrary to Reeves and his Amici's rhetorical argument, the Fifth Circuit's pretext for discrimination analysis is consistent with *Hicks* and does not require "direct evidence" of discriminatory treatment.[6]

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6. The Fifth Circuit and other circuits repeatedly have recognized that a discrimination plaintiff can establish a triable discrimination case with circumstantial evidence. *See, e.g., Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993) (applying *McDonnell Douglas* proof scheme when no direct evidence of age discrimination exists); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 656 (11th Cir. 1998) (applying *McDonnell Douglas* proof scheme to circumstantial evidence case).

II. THE FIFTH CIRCUIT'S PRETEXT FOR DISCRIMINATION ANALYSIS IS CONSISTENT WITH THE ADEA, THE BUSINESS JUDGMENT RULE, AND THE PROOF BURDENS IN DISCRIMINATION CASES

Several compelling reasons demonstrate that the Fifth Circuit's pretext for discrimination analysis properly interprets and applies *Hicks* in the Federal Rule 50 setting.

A. The Fifth Circuit's Analysis is Consistent with the ADEA and the Business Judgment Rule.

The ADEA makes it unlawful for an employer "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a). Under the pretext test advocated by Reeves and his Amici, a discrimination plaintiff is entitled to a jury trial when he produces the combined evidence to (a) support a prima facie case (a younger replacement) and (b) discredit the employer's stated reasons for the discharge. This test conflicts with the ADEA's express statutory language — it not only allows courts and juries to speculate about the real reason for the discharge, but also, it allows them to infer intentional discrimination from the minimal prima facie criteria and the falsity of the employer's stated reasons.

The ADEA, however, does not protect, and Congress did not intend to protect, plaintiffs under a "just cause" theory. As several courts have explained, the pretext-only interpretation would improperly convert the ADEA into a law ensuring dismissals only for "just cause" to all people over 40, rather than one properly preventing discrimination because of age. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988); *White v. Vathally*, 732 F.2d 1037, 1043 (lst Cir. 1984), *cert. denied*, 469 U.S. 933 (1984). In effect, Reeves' pretext-only analysis would afford special treatment to persons over 40 — a form of affirmative action not contemplated under the ADEA.

Recognizing the distinction between "mistaken" and "fabricated" employer decisions, this Court and the federal

courts of appeal consistently have applied the "business judgment rule" in discrimination cases, namely, the ADEA and other civil rights statutes are not vehicles for judicial second guessing of employer business decisions that might be mistaken, unreasonable, or unfair, but are nondiscriminatory. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (concluding that Title VII does not purport to limit the other [nondiscriminatory] qualities and characteristics that employers may take into account in making employment decisions); *Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) (determining that "[w]hether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide."); *Brown v. McDonnell Douglas Corp.*, 113 F.3d 139, 141-42 (8th Cir. 1997) (noting that courts cannot " 'weigh the wisdom of any particular employment decision' " or sit as " 'super-personnel departments' " that review the wisdom or fairness of employers' business judgments, except to the extent that the judgments involve intentional discrimination).[7]

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7. *See also Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) (noting that courts "may not second-guess an employer's personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully."); *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) (explaining that "Title VII is not violated by the exercise of erroneous or even illogical business judgment."); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988) (holding that "courts are not free to second-guess an employer's business judgment"); *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) (holding that "[a] district judge does not sit in a court of industrial relations. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and § 1981 do not interfere."); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (noting that the ADEA "was not intended as a vehicle for judicial review of business decisions.").

Therefore, in the pretext phase of the burden-allocation scheme, a discrimination plaintiff must produce competent evidence that the employer fabricated its articulated reason to mask discrimination, not merely mistaken or unreasonable decisions. This distinction between a "fabricated" and a "mistaken" decision comports with the well-established business judgment rule — it keeps the judiciary out of the human resources business and ensures that, consistent with *Hicks*, a discrimination plaintiff produces sufficient evidence of an employer's intent to cover *discrimination*.

Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir. 1993), exemplifies the proper application of the pretext for discrimination analysis, which allows a court to exercise its proper gatekeeper role by awarding judgment as a matter of law when a plaintiff claims "pretext" based on a potentially mistaken business judgment. Moore, a 30-year Lilly employee, had always been a satisfactory salesman, but Lilly terminated his employment for "falsifying sample records." *Id.* at 814. Complying with the Prescription Drug Marketing Act of 1987, Lilly had a system to track drug samples distributed to physicians by salespersons. Through Lilly's system, all salespersons were required to send "call cards" to Lilly each day, reporting the day's distribution of samples to doctors. The salesperson's daily reports were checked against an inventory of his samples conducted at the end of each quarter. *Id.* If the inventory's results revealed a discrepancy with totals from the salesperson's call cards, then he was considered to be "out of balance," and the disparity would have to be reconciled. *Id.*

When Moore was out of balance in the second quarter of 1990, he sent a letter to the accountability department, attempting to correct the discrepancy. *Id.* Moore apparently never possessed a sufficient supply of samples to make possible the distributions that his letter asserted he had made. Lilly informed Moore that the distribution set forth in his letter was not possible, given the stock he had possessed during the relevant time. *Id.* Moore requested that a Lilly manager return

his letter, but she refused to do so. Lilly then terminated Moore's employment, believing that this incident constituted a falsification of company records. *Id.*

Moore maintained that he had raised a triable fact issue on his pretext burden, claiming that he had not falsified the relevant records and had established a prima facie case. *Id.* at 815-16. Assuming that Moore had established a prima facie case of age discrimination, the Fifth Circuit rejected Moore's argument and explained: "[t]he fact that the employer's reasonable belief eventually proves to have been incorrect — if, for example, Moore were eventually to be vindicated from the charges of falsifying records — would not change the conclusion that the firing had been nondiscriminatory." *Id.* at 816. Additionally, the appeals court reasoned that a discharge may well be "unfair or even unlawful," yet not be evidence of age bias under the ADEA. *Id.* at 819. In the circuit court's words, to maintain a triable ADEA claim, "the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age." *Id.* Because Moore failed to do so, the Fifth Circuit affirmed summary judgment for Lilly. *Id.*

In their futile effort to sustain the jury's age discrimination finding, Reeves and his Amici, like *Moore* before them, rely largely on Reeves' disagreements with Sanderson's performance-based reasons for his discharge. (Pet. Br. 10; EEOC Br. 25-26). They advocate a pretext-only test that effectively eviscerates the well-established business judgment rule, and would allow a court or jury to infer intentional discrimination from a mistaken or unreasonable employer decision. (Pet. Br. 18-32; EEOC Br. 8-30). The practical result: a discrimination case would go to the jury whenever a plaintiff simply challenged or disagreed with the employer's business decision. This proposition would be true in the context of an employer's workforce reduction predicated on economic reasons, or a supervisor's honest assessment of an employee's inadequate work performance. In turn, courts and juries could second guess

or speculate about the employer's business judgment, placing them in the improper role of a "super personnel department." *See Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 403 (7th Cir. 1992) (recognizing that neither juries nor courts have the power to act as a "'super-personnel department'" and decide whether the employer's decision was unwise or unjustified).

Because the ADEA is not a "just cause" statute, the pretext-only test Reeves advocates is misguided — Congress did not intend to give courts or juries unchecked veto power over employer business decisions that they deem mistaken, unfair or unreasonable. Discrimination does not lurk behind every inaccurate or incorrect employer statement; individual decisionmakers may "intentionally dissemble" to mask a nondiscriminatory, but humiliating, unbecoming, or irrational reason, such as institutional politics, greed, envy, nepotism, or personal hostility. *Fisher*, 114 F.3d at 1337. The ADEA, however, does not cover these employer motives.

Moreover, Reeves repeatedly characterizes Sanderson's performance-based reasons for his discharge as "lies," but blurs the distinction between *incorrect* business judgments and *fabricated* reasons for an adverse employment action. (Pet. Br. 21). Contrary to his flip and unsupported assertions, Reeves did not produce any evidence that Sanderson contrived the underlying 1995 audit leading to the company's conclusion that Reeves, Caldwell, and Oswalt had failed to track properly employee absences and late arrivals within their respective lines of authority. Reeves *disagreed* with Sanderson's conclusions regarding his work performance, speculated about his own subjective assessment of his performance, and denied that he failed to perform adequately, but his disagreements and self-assessments do not convert Sanderson's audit, investigation, and the ultimate decision to terminate Reeves into contrived reasons for his discharge. *See, e.g., Beall v. Abbott Labs*, 130 F.3d 614, 619-20 (4th Cir. 1997) (holding that " '[i]t is the perception of the decisionmaker which is relevant; not the self-assessment of the plaintiff.' "); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747

(10th Cir. 1991) (finding that an employee's disagreement with his employer's assessment of his job performance constitutes insufficient grounds for a jury to infer age discrimination). In the end, Reeves, like *Moore*, failed to produce discrete facts showing a nexus between Reeves' age and Sanderson's audit, investigation, and eventual decision to discharge Reeves.[8]

Accordingly, the Fifth Circuit's pretext for discrimination analysis is faithful to the ADEA's language, is consistent with *Hicks*, and avoids the erosion of an employer's business judgment — it requires the discrimination plaintiff to produce sufficient evidence to raise a fact issue on two points: (i) whether the employer's stated reasons were false; *and* (ii) whether age discrimination played a determining role in the employer's decision. *Hicks,* 509 U.S. at 515; *Lawrence,* 163 F.3d at 312; *Rodriguez-Cuervos*, 181 F.3d at 22 n.5. Because Reeves failed to satisfy his burden, this Court should affirm the Fifth Circuit's well-reasoned analysis.[9] ***Reeves v. Sanderson Plumbing Products, Inc.,*** 197 F.3d 688, 691-93 (5th Cir. 1999).

B. The Fifth Circuit's Analysis is Consistent with the Proof Allocation Scheme in a Discrimination Case.

The *McDonnell Douglas-Hicks* proof scheme is well established: when an employer articulates a legitimate, nondiscriminatory reason for its adverse employment action, then any presumption raised by the prima facie case *disappears* and the plaintiff must satisfy his ultimate burden of proving

8. Regarding Reeves' reference to two alleged age-related "stray" remarks, TABCC demonstrates in part III C., *infra*, that those alleged remarks cannot sustain an age discrimination finding.

9. As several courts have recognized, the plaintiff may rely solely on his "pretext" evidence to satisfy both the "falsity" *and* "discrimination" requirements, or he may identify other evidence in the record that points to a discrimination finding. *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996) (en banc); *Fisher,* 114 F.3d at 1338-39. If the plaintiff chooses to rely solely on "pretext" evidence, however, then that same evidence must be *sufficient* to support a *discrimination finding*.

intentional discrimination. *Hicks*, 509 U.S. at 507-08. In *Hicks*, this Court did not use the labels "pretext-plus" or "pretext-only," but required a discrimination plaintiff to demonstrate, as part of his ultimate burden of proof, that the employer's stated reasons for its adverse employment action were both false and that the real reason was discrimination — a *pretext for discrimination* analysis. The *Hicks* Court anchored its pretext for discrimination analysis in the plaintiff's ultimate burden to prove discrimination. *Id.* at 508, 511, 518. This burden remains *at all times* with the plaintiff and *never* shifts to the defendant. *Id.* at 507. Therefore, the Fifth Circuit's analysis is consistent with a plaintiff's ultimate burden of proof in a discrimination case.

In contrast, the pretext-only test advocated by Reeves and his Amici is fundamentally flawed. This approach ignores the Court's statement that a pretext-only or falsity finding is a much different and lesser finding than a discrimination finding. *Id.* at 514-15. In effect, Reeves' pretext test would improperly shift the burden of persuasion back to the employer to establish conclusively that it relied solely on nondiscriminatory reasons in making its employment decisions. *Fisher*, 114 F.3d at 1339 (permitting a plaintiff to win a judgment based on a pretext finding would impermissibly shift the burden of proof to the defendant to disprove discrimination or offer evidence of a "third" reason). Accordingly, under the pretext-only approach, a plaintiff can obtain a jury trial simply by disputing the employer's stated reasons, and relying on a minimal prima facie case allegation that a younger person replaced the plaintiff. The employer is placed in the untenable position of conclusively demonstrating that discrimination played no part in its decision. *See id.* This misplaced interpretation of "pretext" conflicts with the *McDonnell Douglas-Hicks* axiom that plaintiffs, like Reeves, *at all times* bear the burden of proving intentional discrimination. The Fifth Circuit, therefore, correctly applied its two-step pretext for discrimination analysis in concluding that Reeves failed to

present sufficient evidence of age discrimination.[10] *See Reeves*, 197 F.3d at 692-93.

C. Reeves and His Amici Advocate a Pretext Test that is Based on a False Assumption.

To support their pretext argument, Reeves and Amicus EEOC also rely on a so-called "presumption" that once the discrimination plaintiff presents evidence challenging the credibility of the employer's stated reasons for its adverse employment action, a jury is entitled to infer discrimination. (Pet. Br. 18-32; EEOC Br. 8-30). This "presumption" is premised on what one commentator has termed an "ideological litmus test." *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2254 (1995). The "presumption" stems from the idea that the factfinder who disbelieves the employer's stated justification for its employment decision has a basis to infer that the real reason for the decision is discrimination. Relying on language in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), some courts assume it is "more likely than not" that the employer who lies is simply trying to mask the impermissible discrimination alleged by the plaintiff.

The fallacies underlying the "presumption" are twofold. First, it is by no means certain that any particular adverse act against members of a protected group stems from discrimination. When an employer articulates nondiscriminatory reasons for its employment actions, and the plaintiff challenges those reasons, as Reeves purports to do here, the legal system should not create a presumption that his challenge to, or attempt

10. Reeves also refers to *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), to support his pretext-only position, stating that "[i]n holding proof of pretext is not sufficient to prove intentional discrimination, the Fifth Circuit disregards *Patterson*." (Pet. Br. 26). Reeves is mistaken. *Patterson* is a pre-*Hicks* case that did not purport to adopt any particular "pretext" analysis. The *Patterson* pages Reeves cites, 187-88, only reveal this Court's conclusion that plaintiffs are not limited in the types of evidence they may use to demonstrate the falsity of an employer's reasons.

to cast doubt on, the employer's stated reasons leads to the inexorable conclusion that the employer's actions were motivated by discrimination. To do so creates a form of judicially created "affirmative action" in favor of members of the protected class (all employees over 40 years of age), allowing them to recover for some hypothetical "discrimination" based on what the employer's motive *might have been* under the circumstances. Instead, as this Court emphasized in *Hicks*, the discrimination plaintiff is required to produce individualized proof that the employer's stated reasons are a pretext for discrimination. *Hicks*, 509 U.S. at 507-08; 514-17.

Second, deriving a presumption of discrimination from the employee's challenge to the credibility of the employer's reason is unwise — it rests on a flimsy ideological or policy premise that when an employer acts arbitrarily, it always does so for discriminatory reasons the employment discrimination statutes prohibit. *See* Malumud, *The Last Minuet* at 2255-58 (criticizing the "policy" premise underlying any presumption of discrimination); *Fisher*, 114 F.3d at 1337 (noting that discrimination does not lurk behind every inaccurate employer statement; employer may try to hide humiliating or unbecoming reasons for discharge). In *Fisher*, the en banc Second Circuit appropriately recognized that any discrimination "presumption" derived solely from a pretext finding ignores real world employment relationships, where business decisions may camouflage irrational or political judgments that are not infected with any discriminatory bias. *See id.* Further, under the business judgment rule, an employer may make incorrect, unreasonable or even wrong employment decisions, but unless age-related animus fuels those decisions, the employment discrimination statutes, including the ADEA, do not prohibit these decisions. Accordingly, the Fifth Circuit's pretext for discrimination analysis, which correctly applies *Hicks* in a Federal Rule 50 setting, avoids the fallacies underlying the "discrimination presumption" and properly requires a discrimination plaintiff, like Reeves, to present individualized proof or, in the words of *Moore*, "discrete facts" that he was treated differently than

similarly situated employees *because of* his age. *Moore*, 990 F.2d at 819.

Finally, Reeves asserts that a jury is entitled to draw an adverse inference against the employer when it lies about the reasons for its employment actions. Again, this argument ignores *Hicks*. Justice Scalia, writing for the majority, explained that just because an employee counters an employer's stated reasons for its employment actions does not mean that the employer has "lied" about the reasons for its employment decision. *Hicks*, 509 U.S. at 520-21 (explaining that "[t]o say that the company which in good faith introduces testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd."). This proposition is especially true here. Reeves may have disagreed with Sanderson's conclusions stemming from the audit, and he may have disagreed with Sanderson's assessment of his work performance, but those rebuttals and disagreements do not, by any stretch of the imagination, constitute "lies." *Id*. In any event, even if they did, they would not support a discrimination finding. *See id*. at 521 (concluding that "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that.").

III. REEVES FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT AN AGE DISCRIMINATION FINDING UNDER THE ADEA.

Applying its well-established "sufficiency of the evidence" standard for awarding judgment as a matter of law, the Fifth Circuit properly concluded that Reeves failed to produce sufficient evidence to sustain an age discrimination finding.[11]

11. This Brief primarily addresses the Fifth Circuit's proper application of its two-step pretext for discrimination analysis. Reeves, however, also maintains that the Fifth Circuit erred in (i) considering *all* of the evidence, instead of only the evidence favoring him; and (ii) reviewing Sanderson's Rule 50 motion for judgment as a matter of law in the same manner as a Rule 56 motion for summary judgment. (Pet. Br. 33-49). As the EEOC's amicus brief supporting Reeves concedes, these arguments are without merit. (EEOC Br. 23 n. 6).

(Cont'd)

Reeves relies on four evidentiary assertions to support his argument that he presented enough evidence to sustain the jury's discrimination finding: (i) younger individuals replaced him after Sanderson let him go; (ii) he rebutted the inaccurate recordkeeping reason for his discharge; (iii) Sanderson focused on mistakes related to one of his subordinate employees when the company discharged him, but the company focused broadly on numerous recordkeeping mistakes for twelve employees at trial; and (iv) a manager with "absolute power" supposedly made two stray, age-related remarks and that manager was one of three individuals who recommended his discharge. (Pet. Br. 4-15). Singularly or together, this so-called "evidence" is insufficient to sustain an age discrimination finding.

A. Reeves' Minimal Prima Facie Case, Coupled with His Alleged Evidence of Falsity, Does Not Constitute Sufficient Evidence of Age Discrimination.

Reeves and Amici EEOC rely heavily on Reeves' prima facie case, namely, that younger individuals replaced Reeves after Sanderson let him go. (Pet. Br. 21-22; EEOC Br. 21-25). That reliance is misplaced. In the context of an ADEA discharge claim, the prima facie case is a minimal one; it is essentially a procedural device to force the employer to explain its reasons for an adverse employment action. *See, e.g, Fisher*, 114 F.3d at 1340-42 (explaining that prima facie case serves limited purpose of "forcing out employer's explanation"); *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 316 (2d Cir. 1999) (ADEA prima facie case is a *de minimis* burden); *Nichols v.*

(Cont'd)

Consistent with the Fifth Circuit's analysis, courts review *all* of the evidence — "the record taken as a whole" — when considering Rule 56 summary judgment motions (they merely draw inferences in the non-movant's favor), and the standard for granting Rule 56 summary judgment motions "mirrors" the standard for granting Rule 50 motions for judgment as a matter of law. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996) (plaintiffs " 'need only make a very minimal showing' " to establish an ADEA prima facie case); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (proof necessary to establish ADEA prima facie case on summary judgment "is minimal and does not even need to rise to the level of a preponderance of the evidence.").

Here, when Sanderson articulated its nondiscriminatory reasons for discharging Reeves, his minimal prima facie case disappeared and he was put to the ultimate test to produce sufficient evidence of age discrimination. *Hicks*, 509 U.S. at 510-11.[12] At the pretext for discrimination stage, Reeves cannot resurrect the "replacement" evidence as an "inference" of age discrimination; the "replacement" fact does not tend to show that Sanderson contrived its articulated reasons as a cover for age discrimination. *Fisher*, 114 F.3d at 1342-44. Moreover, younger employees naturally tend to replace older employees and, as several courts have concluded, the mere fact of replacement by a younger employee does not support an inference that the employer intentionally discriminated against an employee on account of his age. *See Chappell v. GTE Products Corp.*, 803 F.2d 261, 267 (6th Cir. 1986) (concluding that "[t]he isolated fact that a younger person eventually replaces an older employee is not enough to permit a rebuttal inference that the replacement was motivated by age discrimination.").

B. Reeves' Evidence Contesting His Unsatisfactory Work Performance Does Not Support an Age Discrimination Finding.

Reeves characterizes Sanderson's reasons for his discharge as "lies," contending that he did not fail to keep accurate absenteeism/tardy records, and that his supervisor, Caldwell, was ultimately responsible for any recordkeeping failures. (Pet. Br. 10-13, 21). In turn, Reeves maintains that Sanderson offered "shifting" reasons for his discharge, telling him one thing

12. *Cf.* Malamud, *The Last Minuet* at 2244-45, 2317-23 (1995) (opining that prima facie case has little evidentiary value).

when the company discharged him, and articulating a different reason at trial. (Pet. Br. 10). Cutting through Reeves' rhetoric about "lies," his purported evidence is reduced to two things: (i) he challenged the records revealing his errors in tracking subordinate employees' absences/late arrivals; and (ii) he disagreed with Sanderson's audit and resulting assessment that any admitted errors warranted his discharge because Caldwell, not he, ultimately was responsible for any timekeeping errors. (Pet. Br. 10-15).

Reeves misses the point. While he may have disputed the evidence underlying the alleged recordkeeping errors, that dispute cannot sustain an age discrimination finding. It is well established that a discrimination plaintiff cannot raise a material fact issue regarding pretext by simply refuting the employer's legitimate, nondiscriminatory reason. *Hicks*, 509 U.S. at 511 n.4, 515; *Roxas v. Presentation College*, 90 F.3d 310, 316 (8th Cir. 1996). Likewise, Reeves' disagreement with Sanderson's assessment of his work performance, especially as it related to his duty to review the accuracy of the daily, weekly, and monthly time reports, cannot sustain a discrimination finding. *See Fallis*, 944 F.2d at 747 (concluding that an employee's disagreement with his employer's assessment of his job performance does not allow a jury to infer age discrimination).[13]

Rather, Reeves was required to produce evidence that Sanderson fabricated its stated reasons as a pretext for age

13. *See also Beall v. Abbott Labs.*, 130 F.3d 614, 619-20 (4th Cir. 1997) (holding that, in disagreements about performance, " '[i]t is the perception of the decisionmaker which is relevant,' not the self-assessment of the plaintiff."); *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1262-63 (7th Cir. 1993), *cert. denied*, 511 U.S. 1005 (1994) (courts may not sit as super-personnel departments that review employers' decisions — the employer is in a better position than a court to assess its employees' relative qualifications and performance); *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1403-04 (10th Cir. 1988) (age discrimination verdict cannot stand on the employee's disagreement over his qualifications alone).

discrimination. He failed to do so. Reeves, for example, never challenged the 1993 warning memorandum or the underlying 1995 audit as Sanderson's fabricated efforts to discharge him because he was "too old." Instead, Reeves focused on the accuracy of the records, explained that he was not at fault, or tried to shift the blame to his immediate supervisor. But none of these explanations tend to show that Sanderson fabricated the underlying 1995 audit leading to the discharge of Reeves and the younger Caldwell, and the audit's nondiscriminatory conclusion that Reeves, Caldwell, and the 33 year old Oswalt were responsible for the recordkeeping errors.[14]

Further, the Fifth Circuit correctly concluded that Sanderson's so-called "shifting" reasons for discharging Reeves did not constitute sufficient evidence of age discrimination. Sanderson consistently maintained, from the time it discharged Reeves to the time of trial, that the company decided to let Reeves go because of unsatisfactory job performance related to recordkeeping errors. Even if the company had focused on one particular employee during Reeves' exit interview, and later focused on numerous employee examples at trial, that broader focus does not sustain any finding of age discrimination. Sanderson's articulated reasons for the discharge did not "shift" or change; the company simply buttressed its original explanation with additional evidence at trial. That is a far cry from any contrived reason for the discharge.

Accordingly, Reeves' attempt to use the younger "replacement" fact, in combination with his rebuttal of Sanderson's stated reasons, is unavailing. His combined "evidence" is insufficient to support a reasonable finding of age discrimination.

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14. The record also demonstrates that Sanderson would have discharged Oswalt for the same reasons as it discharged Reeves, had Oswalt not resigned from Sanderson in August 1995. (Res. Br. 2).

C. The Two Alleged Stray Remarks Do Not Support an Age Discrimination Finding.

Finally, Reeves and his Amici rely on two alleged stray remarks to support the jury's age discrimination finding. (Pet. Br. 4; EEOC Br. 6). As this Court and the federal circuit courts have concluded, alleged discriminatory remarks do not constitute evidence of a discriminatory motive when the remarks are "stray" ones, namely, vague, remote in time, or made by a non-decisionmaker. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513-14 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991); *Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 925 (7th Cir. 1988).

Reeves contends that Powe Chesnut, the Director of Quality Control, made two age-related remarks approximately two months before Reeves' dismissal: "[y]ou are so old you must have come over on the Mayflower" and, when Reeves experienced trouble with a machine, Chesnut supposedly said, "[y]ou are too damn old to do your job." Applying the well-established "stray" remarks test, one that is consistent with this Court's *Price Waterhouse* decision, the Fifth Circuit concluded that Chesnut's alleged remarks did not constitute sufficient evidence of age discrimination. This analysis is correct. Based on the uncontested facts adduced at trial, Ms. Sanderson *alone*, not Chesnut, made the ultimate decision to discharge Reeves.[15]

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15. Reeves cites *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985), for the proposition that "the motives of *all* decisionmakers need not be proved to establish a discrimination case." This argument is misguided. Chesnut was not a decisionmaker and, therefore, *Anderson* is inapposite. (Pet. Br. 30). Further, even if Chesnut had been the decisionmaker or if, as Reeves suggests in footnote 21 of his brief, Chesnut only had to be involved in the decisional process, Reeves still failed to produce sufficient evidence to support a discrimination finding — he failed to demonstrate that Chesnut's alleged remarks were related to the decisional process. *See, e.g., Shorette v. Rite Aid*, 155 F.3d 8, 13

(Cont'd)

Additionally, Chesnut was only one of three persons who recommended that Ms. Sanderson discharge Reeves based on the audit results. Even if Chesnut had harbored some age-related animus against Reeves, the undisputed testimony reveals that Chestnut's alleged remarks made some two months before the discharge decision, could not have been a determining factor in Sanderson's decision to discharge Reeves — a decision that led to the discharge of both Reeves and the *younger* Caldwell. Reeves did not produce any evidence of a nexus between the alleged remarks and Ms. Sanderson's decision two months later.

CONCLUSION

In light of the principles espoused in *Hicks*, the Fifth Circuit properly applied a pretext for discrimination analysis to determine that Reeves failed to present sufficient evidence to support an age discrimination finding. Reeves' skeletal prima facie case (his replacement by a younger person), coupled with his supposed evidence contesting his inadequate work performance, should not sustain a discrimination finding under the ADEA. The Fifth Circuit's pretext for discrimination analysis is faithful to the ADEA's language prohibiting *age* discrimination, is consistent with the business judgment rule, and comports with the plaintiff's ultimate burden to prove intentional age discrimination. The Fifth Circuit appropriately exercised its gatekeeper role to reject the jury's finding when, based on *all* the evidence, it was not anchored in sufficient evidence of discrimination. Contrary to Reeves and his Amici's accusations, the appeals court did not invade the province of the jury, but simply determined that judgment as a matter of law was warranted in view of Reeves' failure to produce sufficient evidence that Sanderson's stated reasons were fabricated and that age discrimination was the real reason.

(Cont'd)
(1st Cir. 1998) (recognizing that decisionmakers' statements that are unrelated to the decisional process are normally insufficient to prove the employer's discriminatory animus).

Therefore, this Court should affirm the Fifth Circuit's judgment in favor of Sanderson.

Respectfully submitted,

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